

97 CV 2802 - EHN - MS

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

-----x

WILLIAM AYUSO,

97 CV 2802

Plaintiff,

MEMORANDUM

- against -

AND

ORDER

JANET RENO, Attorney General,  
Department of Justice,  
Bureau of Prisons Agency,

Defendant.

-----x

WILLIAM AYUSO  
2154 2nd Avenue Apt. #2C  
New York, New York 10029  
plaintiff pro se.

ZACHARY W. CARTER, United States Attorney  
(Gail A. Matthews, of Counsel)  
Eastern District of New York  
1 Pierrepont Plaza, 14<sup>th</sup> Floor  
Brooklyn, New York 11201  
for defendant.

NICKERSON, District Judge:

Plaintiff pro se filed this action on May 15, 1997  
alleging that his former employer, the U.S. Department  
of Justice, Federal Bureau of Prisons ("the agency"),  
discriminated against him on the basis of his race,  
color, and national origin in violation of Title VII of

elm

the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, et seq. ("Title VII").

Defendant claims that the Eastern District of New York is not a proper venue for the action and moves to transfer or, in the alternative, to dismiss the case pursuant to 42 U.S.C. § 2000e-5(f)(3) and 28 U.S.C. § 1406(a).

I

Although the case has a history spanning over 15 years, the record submitted to the court by the parties consist only of the following. Plaintiff filed (1) his civil complaint, (2) a copy of the final decision of the Equal Employment Opportunity Commission ("the Commission" or "EEOC") dated April 25, 1997, and (3) a letter dated May 5, 1997 from a Raymond Rivera, a lawyer, to plaintiff.

Defendant submitted (1) a memorandum of law in support of its motion to transfer or dismiss, (2) a copy of what plaintiff filed with the court, (3) a copy of plaintiff's initial "Complaint of Discrimination" dated October 15, 1983, filed with the agency on a one-page standardized form, (4) a decision issued by the

Commission on March 29, 1993, and (5) a letter dated August 20, 1993 from Raymond Rivera Esteves to an Equal Employment Opportunity Officer ("EEO Officer") of the agency.

In the 1983 complaint to the agency, plaintiff alleged that while working as a correctional officer at a U.S. Penitentiary in Lompoc, California: (1) he was sent home on administrative leave although he was doing his job "normally"; (2) he had been called names; (3) he was not paid for two and one-half hours; and (4) he had been harassed by a lieutenant unreasonably.

Neither party submitted anything -- no affidavits, administrative records, or correspondence -- to document the following ten year period between 1983 and 1993, despite the fact that several events providing essential background to the case appear to have occurred then. The only source of information for that period in the record is the Commission's 1993 decision which summarized the procedural history and background of the case as follows:

After filing his complaint of discrimination with the agency on October 15, 1983, plaintiff resigned from his job on May 23, 1984 and alleged constructive

discharge. In a letter dated September 14, 1984, the agency acknowledged receipt of plaintiff's complaint of 1983 but stated that it would not begin its investigation due to plaintiff's constructive discharge complaint. Plaintiff was told by an EEO Officer that he would first be "counseled" on the constructive discharge matter. The agency would then review the counselor's report and if it determined that the constructive discharge allegations met the "procedural requirements for acceptance," the two complaints would be consolidated and investigation initiated on both matters.

Plaintiff apparently never received counseling on his constructive discharge allegations and the agency took nearly three years to appoint an investigator to plaintiff's case. Further delays ensued and the investigation was only completed around February of 1989. Around March of 1989, plaintiff retained an attorney from some legal aid service. On May 24, 1989, an agency investigator forwarded a copy of the investigation report to plaintiff and informed him that he must contact the agency's EEO Officer within thirty days if he thought the investigation was incomplete.

By a letter dated June 20, 1989, plaintiff through his attorney responded that the investigation was incomplete because there was no investigation of the constructive discharge allegations. The Commission found nothing in the record to show that the agency responded to plaintiff's letter.

The Commission's decision goes on to summarize the events of 1991 to 1993 as follows. On February 28, 1991, plaintiff inquired about the status of his case and demanded its speedy resolution. On April 30, 1991, the agency issued a "Proposed Disposition" finding, recommending remedial relief of two and one-half hours of backpay and attorneys' fees. The disposition was adopted by the agency as a final decision on August 4, 1992.

Plaintiff appealed the decision to the Commission, claiming that because he had been "forced" to resign, the proper relief for his complaint should include backpay from the date of his resignation. Plaintiff appears to have contested the agency's finding that his constructive discharge complaint of 1984 had never been filed or consolidated into his first complaint filed in 1983.

In the 1993 decision, the Commission found that plaintiff sufficiently informed the agency of his desire to pursue a complaint of constructive discharge and remanded the matter to the agency to determine whether the alleged harassment contributed to or resulted in plaintiff's constructive discharge.

In a letter dated August 20, 1993 written by plaintiff's attorney and addressed to Jane Redmon, an EEO Officer, plaintiff said that he had been interviewed by the agency and offered reinstatement without backpay, but that he had declined. He also asked that his allegations of constructive discharge be properly remedied and demanded reinstatement, backpay plus interest, and a sum of not less than one million five hundred thousand dollars for mental anguish, pain and suffering.

Neither party submitted anything to document the agency proceedings that must have followed the remand. There is in the record the Commission's decision of April 25, 1997 dismissing plaintiff's complaint. It states that although in its prior decision it had found that plaintiff had been discriminated against, he could not recover under a theory of constructive discharge

because he had failed to demonstrate that the incidents of harassments, taken individually or as a group, rose to such a level that a reasonable person in his position would have resigned under the circumstances.

On May 15, 1997 plaintiff filed the action here. His complaint alleges that during his employment at the United States Penitentiary in Lompoc, California, he was subjected to discrimination and harassment because of his race (Hispanic), color (brown), and national origin (Puerto Rican). He states that he was called names such as "Useless," "Ayusless," "Nigger," "Ugly Sucker," and "Wetback," and that he was harassed by his co-worker and his supervisor. He alleges that even after he filed his original complaint, no action was taken by his employer to address his concerns. Finally, he states that he resigned because he felt that "no one care [sic] about [his] complaints" and that the discrimination and harassment would be allowed to continue.

Neither party appeared at a hearing scheduled before this court on June 5, 1998 on the defendant's motion to dismiss or transfer. The court considers the defendant's motion on submission.

## II

Defendant argues that the Eastern District of New York is not the proper venue for the action. Once an objection to venue has been raised, the plaintiff bears the burden of establishing that venue is proper. See Micro-Assist, Inc. v. Cherry Communications, Inc., 961 F.Supp. 462, 464 (E.D.N.Y. 1997) (J. Glasser); D'Anton Jos, S.L. v. Doll Factory, Inc., 937 F.Supp. 320, 321 (S.D.N.Y. 1996).

Determination of proper venue in a Title VII claim is governed by 42 U.S.C. § 2000e-5(f)(3). See, e.g., Bolar v. Frank, 938 F.2d 377 (2d Cir. 1991) (per curiam); Arrocha v. Panama Canal Commission, 609 F.Supp. 231, 234-5 (E.D.N.Y. 1985). That section provides that Title VII actions may be brought in:

[1] any judicial district in the State in which the unlawful employment practice is alleged to have been committed, [2] in the judicial district in which the employment records relevant to such practice are maintained and administered, or [3] in the judicial district in which the aggrieved person would have worked but for the alleged unlawful employment practice, but if the respondent is not found within any such district, such an action may be brought within the judicial district in which the respondent has his principal office.



It appears that the Eastern District of New York is not the proper venue. First, the complaint states, and defendant does not deny, that all of the alleged discriminatory acts took place in Lompoc, California. Second, defendant says that all of the relevant employment records, to the extent they still exist, are maintained and administered in Lompoc, California. Plaintiff has not presented any evidence to contest these statements. Finally, defendant says that had the alleged discriminatory acts not occurred, plaintiff presumably would have continued to work in Lompoc, California. Plaintiff does not disagree. Plaintiff has failed to establish that venue is proper in this district.

### III

Under 28 U.S.C. § 1406, where venue is improper, a district court shall "dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

Here, if the court were to dismiss, plaintiff would be time-barred from bringing a new action elsewhere. A Title VII action must be brought within

90 days of receipt of an EEOC right-to-sue letter, see 42 U.S.C. § 2000e-5(f)(1), and the timely filing of a complaint does not toll the 90-day statutory period. See Minnette v. Time Warner, 997 F.2d 1023 (2d Cir. 1993). Therefore, in the interest of justice this court transfers the action to a district where venue is proper, namely, the district encompassing Lompoc, California where the alleged discriminatory acts took place, the employment records are maintained, and plaintiff would have worked but for the alleged unlawful discrimination.

## IV

The case is transferred to the Central District of California. If plaintiff is unable to afford an attorney, he may apply to the transferee court for a court-appointed counsel pursuant to 42 U.S.C. § 2000e-5(f)(1).

So ordered.

Dated: Brooklyn, New York  
October 29, 1998

Eugene H. Nickerson  
Eugene H. Nickerson, U.S.D.J.